

often than before because critical habitat has increased their awareness of the species.

Federal activities that have undergone previous section 7 consultation on the effects of the action on wintering piping plover habitat are listed below. The action agencies involved in these consultations have included the COE, U.S. Coast Guard, and other Department of Defense agencies, National Park Service, FHA, Minerals Management Service, Bureau of Land Management, and Federal Energy Regulatory Commission.

- (1) Dredging and dredge spoil placement;
- (2) Seismic exploration;
- (3) Construction and installation of facilities, pipelines, and roads associated with oil and gas development;
- (4) Oil and other hazardous material spills and cleanup;
- (5) Construction of dwellings, roads, marinas, and other structures, and associated activities including staging of equipment and materials;
- (6) Beach nourishment, cleaning, and stabilization (e.g., construction and maintenance of jetties and groins, planting of vegetation, and placement of dune fences);
- (7) Certain types and levels of recreational activities, such as vehicular activity that impact the substrate, resulting in reduced prey or disturbance to the species;
- (8) Stormwater and wastewater discharge from communities;
- (9) Sale, exchange, or lease of Federal land that contains suitable habitat and that may result in the habitat being altered or degraded;
- (10) Marsh and coastal restoration, particularly restoration of barrier islands and other barrier shorelines;
- (11) Military missions; and
- (12) Bridge or culvert construction, reconstruction, and stabilization.

With this designation of critical habitat for wintering piping plovers, we notify the COE, other permitting agencies, and the public that Clean Water Act section 404 nationwide permits and other authorizations for activities within these designated critical habitat areas must comply with section 7 consultation requirements for critical habitat. For each section 7 consultation, we already review the direct and indirect effects of the proposed projects on piping plovers, and will continue to do so for the designated critical habitat.

Activities that may destroy or adversely modify critical habitat are those that alter the primary constituent elements (defined above) to an extent

that the value of critical habitat for both the survival and recovery of the piping plover is appreciably reduced. These activities may destroy or adversely modify critical habitat by:

- (1) Significantly and detrimentally altering the hydrology of tidal flats;
- (2) Significantly and detrimentally altering inputs of sediment and nutrients necessary for the maintenance of geomorphic and biologic processes that insure appropriately configured and productive systems;
- (3) Introducing significant amounts of emergent vegetation (either through actions such as marsh restoration on naturally unvegetated sites, or through changes in hydrology such as severe rutting or changes in storm or wastewater discharges);
- (4) Significantly and detrimentally altering the topography of a site (such alteration may affect the hydrology of an area or may render an area unsuitable for roosting);
- (5) Reducing the value of a site by significantly disturbing plovers from activities such as foraging and roosting (including levels of human presence significantly greater than those currently experienced);
- (6) Significantly and detrimentally altering water quality, that may lead to decreased diversity or productivity of prey organisms or may have direct detrimental effects on piping plovers (as in the case of an oil spill); and
- (7) Impeding natural processes that create and maintain washover passes and sparsely vegetated intertidal feeding habitats.

Requests for copies of the regulations on listed wildlife and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, New Mexico 87103–1306 for Texas, and to the U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 for all other States. If you have questions regarding whether specific activities will constitute adverse modification of critical habitat, the following Fish and Wildlife Service personnel may be contacted:

Alabama: Darren LeBlanc (334/441–5181)
 Florida: Northwest FL: Patty Kelly (850/769–0552, extension 228), North FL: Candace Martino (904/232–2580, extension 129), South FL: Dave Martin (561/562–3909 extension 230)
 Georgia: Robert Brooks (912/265–9336, extension 25)
 Louisiana: Debbie Fuller (337/291–3124)
 Mississippi: Linda LaClaire (601/321–1126)

North Carolina: David Rabon (919/856–4520 extension 16)
 South Carolina: Paula Sisson (843/727–4707, extension 18)
 Texas: Loretta Pressly (361/994–9005, extension 228)

Summary of Changes From the Proposed Rule

For the proposed rule, shoreline was mapped at variable scales (zoom factors) and with less detail. For the final rule, all shoreline was mapped at 1:5000 or larger (greater zoom) scale. In addition to the standardized mapping scale, the shoreline was mapped more precisely. This change in mapping technique and detail resulted in an increase in reported total mapped shoreline kilometers and miles for some States. This also resulted in increases in reported mapped shoreline distances by ownership for some States.

In the proposed rule, a single buffer distance was set for all units in all States. For the final rule, this methodology was not used (see “Methods” section).

We have excluded Padre Island National Seashore from the proposed critical habitat designation, based upon a determination under section 4(b)(2) of the Act that the benefits of excluding the Seashore outweigh the benefits of its inclusion. Please refer to the “Exclusions Under 4(b)(2) of the Act” section of this rule for further explanation of this analysis.

Unit-Specific Changes

Below are descriptions of unit-specific changes. The changes stated below do not include those attributed to our more fine-scale mapping from the proposed rule. Based on the verbal unit descriptions provided in the proposed rule, we feel that the public had ample opportunity to comment on the unit areas below as we have finalized them in this rule.

North Carolina

NC–3 Clam Shoals

For the proposed rule, the Digital Orthophoto Quarter Quad (DOQQ) image for this unit was not available, so we estimated its location using a NC Atlas and Gazetteer. For the final rule we used a 1:100K Digital Raster Graphic (DRG) image. The correct version is located slightly outside of the bounds of the proposed map. This unit is entirely State-owned and its inclusion is supported by State biologists. This unit consists of small uninhabited islands that are relatively inaccessible by humans and used primarily by birds.

NC-5 Ocracoke Island

We removed the eastern 3.7 km (2.3 mi) of this unit when information was received orally during the comment period from Service biologists familiar with the area. Their observations and knowledge attest that piping plovers concentrate within one mile of the Ocracoke Inlet.

Georgia

GA-14 Sea/St. Simon's Island

We reduced this unit by approximately 360 m (1,200 ft) on the northern shoreline to exclude an existing seawall and groin.

Florida

FL-4 Marifarms

We deleted this unit based upon a lack of evidence of regular use by piping plovers.

FL-7 Cape San Blas

We removed 1 mile of shoreline due to specific site data provided by Eglin Air Force Base that documents no use of the western (mile markers 2.1-3.0) shoreline by piping plovers, yet consistent use on their remaining 2 miles of shoreline between 1 mile markers 0.0 and 2.0.

FL-12 Lanark Reef

Due to a mapping error, we inadvertently omitted the constituent elements on the eastern end of Lanark Reef. This unit extends outside of the area designated in the proposed rule by 0.45 km (0.28 mi) to capture emerging sandbars adjacent to Lanark Reef. This unit is entirely State-owned, and its inclusion is supported by State biologists. This unit consists of small uninhabited islands that are relatively inaccessible by humans and used primarily by birds.

FL-24 Captiva Island and Sanibel Island

We deleted this unit based on lack of evidence of regular use by piping plovers.

FL-26 Estero Island

We reduced this unit by 2.0 km (1.25 mi) after a meeting during the open comment period with State biologists who confirmed that piping plovers use the areas from the lagoon east to the inlet and not further to the west. We removed the area west of the lagoon located on Estero Island based on a lack of use by piping plovers.

FL-27 Marco Island

This area was reduced significantly. We received sufficient information during the comment period to document

and confirm consistent piping plover use of Tigertail Beach County Park and Sand Dollar Island and its associated sand bars within Big Marco Pass. No data were supplied that documented the use of Hideaway beach or the private beach south of Tigertail Beach County Park. Thus these areas were removed from the designation based on a lack of use by piping plovers.

FL-35 Nassau Sound-Huguenot

Third Bird Island and the shoreline of Big Talbot Island were inadvertently omitted in the proposed rule map of FL-35. Data received prior to the proposed rule documented consistent use at these sites. The unit description in the proposed rule appropriately described this unit to include these areas.

FL-36 Tiger Islands

This unit was reduced by 2.6 km (1.6 mi) after we received data during the comment period that better defined the location used by piping plovers.

Alabama

Unit AL-2: Dauphin, Little Dauphin, and Pelican Islands

We removed the eastern end of Dauphin Island, from St. Stephens Street to the eastern tip, due to lack of evidence of consistent use of this portion of the island by piping plovers.

Mississippi

Unit MS-7: Beauvoir

We deleted this unit based on a lack of evidence of regular use by piping plovers.

Unit MS-8: Biloxi West

We deleted this unit based on a lack of evidence of regular use by piping plovers.

Unit MS-9: Biloxi East

We deleted this unit based on a lack of evidence of regular use by piping plovers.

Louisiana

Unit LA-1: Texas/Louisiana border to Cheniere au Tigre

We excluded three areas along the shoreline in the proposed unit based on a lack of evidence of regular use by piping plovers. Those areas included the shoreline between the west side of Constance Beach to the east side of Holly Beach, the shoreline from the eastern boundary of the Rockefeller Wildlife Refuge to the Freshwater Bayou Canal, and the shoreline from the west border of the Paul J. Rainey Wildlife Sanctuary east to the Vermilion parish line.

Unit LA-2: Atchafalaya River Delta

We excluded the Wax Lake Outlet Deltas lobe and the western portion of the Atchafalaya River Delta based on a lack of evidence of use by piping plovers.

Unit LA-3: Point Au Fer Island

We excluded the shoreline from the point where the un-named oil and gas canal extending southeast from Locust Bayou meets the shoreline to the western side of East Bay Junop based on a lack of evidence of use by piping plovers.

Unit LA-5: Timbalier Island to East Grand Terre Island

The shoreline of East Timbalier Island, the shoreline from Bay Champagne to the west side of Elmers Island, the area between the hurricane protection levee and the bayside shoreline of Grand Isle, and the shoreline of Grand Terre Island were excluded due to lack of evidence of use by piping plovers.

Unit LA-6: Mississippi River Delta

We reduced this unit by 261,247 ha (645,280 ac) after the Service and the Louisiana Department of Wildlife and Fisheries surveyed for piping plovers in this area during December 2000. Piping plovers were located only on the sand islands off the South Pass of the Mississippi River during that survey effort. Plovers were documented using the same islands during the February 2001 International Piping Plover Survey. Thus, this unit consists only of those islands.

Economic Analysis

Section 4(b)(2) of the Act requires that we designate critical habitat on the basis of the best scientific and commercial information available and that we consider the economic and other relevant impacts of designating a particular area as critical habitat. The economic impacts to be considered in a critical habitat designation are the incremental effects of the designation over and above the economic impacts attributable to listing of the species.

We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying those areas as critical habitat; however, we cannot exclude areas from critical habitat when the exclusion will result in the extinction of the species. We utilized the economic analysis, and took into consideration all comments and information submitted during the public hearings and comment period, to determine whether areas should be

excluded from the final critical habitat designation.

An analysis of the economic effects of the proposed wintering plover critical habitat designation was prepared (Industrial Economics, Incorporated, 2001) and made available for public review (65 FR 52691; August 30, 2000). The economic analysis reflected the assumption that some additional impacts may be experienced as a result of critical habitat designation. The analysis uses a sampling of case studies provided by commenters as well as interviews with stakeholders with projects that had the requisite Federal nexus for our analysis. Estimates of the cost of an individual consultation were developed from a review and analysis of historical section 7 files from a number of Service field offices around the country. These files addressed consultations conducted for both listings and critical habitat designations. Cost figures were based on an average level of effort for consultations of low, medium, or high complexity, multiplied by the appropriate labor rates for staff from the Service and other Federal agencies. Thus, the cost estimates included the potential impact from all expected future consultations in the area proposed to be designated as critical habitat.

Economic effects caused by listing the wintering population of the piping plover as a federally protected threatened species, and by other statutes, are the baseline against which we evaluated the effects of the critical habitat designation. The final analysis, which reviewed and incorporated public comments, concluded that there would be some impacts as discussed below in the "Exclusions Under 4(b)(2) of the Act" section of the rule, but that they would not be significant beyond those already imposed by listing the wintering plover population as a threatened species.

The economic analysis revealed six activities that may be affected by the designation of wintering critical habitat for the piping plover because they occur within or near critical habitat areas. These activities are: (1) housing and commercial shoreline development; (2) dredging and disposal of dredged materials; (3) beach nourishment; (4) oil and gas exploration, (5) recreational visitation of shoreline, and (6) waterway operations. Additionally highway construction and disaster relief were also identified as activities that could be potentially affected due to the designation of some units.

Economic effects of critical habitat designation are only those effects that result from the designation. Since the

listing of the wintering population of the piping plover as threatened in 1985, we have consulted on the above mentioned activities at one time or another. While the economic analysis considered the effect that critical habitat designation could have on these activities, any costs associated with these activities within critical habitat would most likely occur as a result of the listing, due to the occupied status of critical habitat. However, the analysis recognizes that, even in cases where consultations would be expected in the absence of critical habitat, there are scenarios that could involve additional consultation costs. For example, (1) some consultations that have already been "completed" may need to be reinitiated to address critical habitat if the project is not completed; and (2) consultations taking place after critical habitat designation may take longer because critical habitat issues will need to be addressed.

Exclusions Under 4(b)(2) of the Act

A draft analysis of the economic effects of the proposed wintering piping plover critical habitat designation was prepared and made available for public review (August 30, 2000; 65 FR 52691). We concluded in the final analysis, that included review and incorporation of public comments, that no significant economic impacts are expected from critical habitat designation above and beyond those already imposed by the listing of wintering piping plovers. A copy of the final economic analysis is included in our administrative record and may be obtained by contacting the Corpus Christi Ecological Services Field Office (see ADDRESSES section).

Subsection 4(b)(2) of the Act allows us to exclude areas from critical habitat designation where the benefits of exclusion outweigh the benefits of designation, provided the exclusion will not result in the extinction of the species. For the following reasons, we believe that in most instances the benefits of excluding Habitat Conservation Plans (HCPs) from critical habitat designations will outweigh the benefits of including them.

(1) Benefits of Inclusion

The benefits of including HCP lands in critical habitat are normally small. The principal benefit of any designated critical habitat is that Federal activities in such habitat that may affect it require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid adverse modification of critical habitat. Where HCPs are in place, our experience indicates that this benefit is

small or non-existent. Currently approved and permitted HCPs are already designed to ensure the long-term survival of covered species within the plan area. Where we have an approved HCP, lands that we ordinarily would define as critical habitat for the covered species will normally be protected in reserves and other conservation lands by the terms of the HCP and its implementation agreements. The HCP and implementation agreements include management measures and protections for conservation lands that are crafted to protect, restore, and enhance their value as habitat for covered species.

In addition, a section 10(a)(1)(B) permit issued by us as a result of an HCP application must itself undergo consultation. While this consultation may not look specifically at the issue of adverse modification of critical habitat, it will look at the very similar concept of jeopardy to the listed species in the plan area. Since HCPs, particularly large regional HCPs, address land use within the plan boundaries, habitat issues within the plan boundaries will have been thoroughly addressed in the HCP and the consultation on the HCP. Our experience is also that, under most circumstances, consultations under the jeopardy standard will reach the same result as consultations under the adverse modification standard. Implementing regulations (50 CFR Part 402) define "jeopardize the continued existence of" and "destruction or adverse modification of" in very similar terms. Jeopardize the continued existence of means to engage in an action "that reasonably would be expected * * * to reduce appreciably the likelihood of both the survival and recovery of a listed species." Destruction or adverse modification means an "alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species, in the case of critical habitat by reducing the value of the habitat so designated. Thus, actions satisfying the standard for adverse modification are nearly always found to also jeopardize the species concerned, and the existence of a critical habitat designation does not materially affect the outcome of consultation. Additional measures to protect the habitat from adverse modification are not likely to be required.

The development and implementation of HCPs provide other important conservation benefits, including the development of biological information

to guide conservation efforts and assist in species recovery and the creation of innovative solutions to conserve species while allowing for development. The educational benefits of critical habitat, including informing the public of areas that are important for the long-term survival and conservation of the species, are essentially the same as those that would occur from the public notice and comment procedures required to establish an HCP, as well as the public participation that occurs in the development of many regional HCPs. For these reasons, then, we believe that designation of critical habitat has little benefit in areas covered by HCPs.

(2) Benefits of Exclusion

The benefits of excluding HCPs from being designated as critical habitat may be more significant. During two public comment periods on our critical habitat policy, we received several comments about the additional regulatory and economic burden that may result from critical habitat designation. These include the need for additional consultation with us and the need for additional surveys and information gathering to complete these consultations. HCP applicants have also stated that they are concerned that third parties may challenge HCPs on the basis that they result in adverse modification or destruction of critical habitat, should critical habitat be designated within the HCP boundaries.

The benefits of excluding HCPs include relieving landowners, communities, and counties of any additional minor regulatory review that might be imposed by critical habitat. Many HCPs, particularly large regional HCPs, take many years to develop and, upon completion, become regional conservation plans that are consistent with the conservation of covered species. Many of these regional plans benefit many species, both listed and unlisted. Imposing an additional regulatory review after HCP completion may jeopardize conservation efforts and partnerships in many areas and could be viewed as a disincentive to those developing HCPs. Excluding HCPs provides us with an opportunity to streamline regulatory compliance and confirms regulatory assurances for HCP participants.

A related benefit of excluding HCPs is that it would encourage the continued development of partnerships with HCP participants, including States, local governments, conservation organizations, and private landowners, that together can implement conservation actions we would be unable to accomplish alone. By

excluding areas covered by HCPs from critical habitat designation, we preserve these partnerships, and, we believe, set the stage for more effective conservation actions in the future.

In general, we believe the benefits of critical habitat designation to be small in areas covered by approved HCPs. We also believe that the benefits of excluding HCPs from designation are significant. Weighing the small benefits of inclusion against the benefits of exclusion, including the benefits of relieving property owners of an additional layer of approvals and regulation, together with the encouragement of conservation partnerships, would generally result in HCPs being excluded from critical habitat designation under section 4(b)(2) of the Act.

Not all HCPs are alike with regard to species coverage and design. Within this general analytical framework, we need to individually evaluate completed and legally operative HCPs in the range of wintering piping plovers to determine whether the benefits of excluding these particular areas outweigh the benefits of including them.

In the event that future HCPs covering the wintering piping plover are developed within the boundaries of designated critical habitat, we will work with applicants to ensure that the HCPs provide for protection and management of habitat areas essential for the conservation of the piping plover by either directing development and habitat modification to nonessential areas or appropriately modifying activities within essential habitat areas so that such activities will not adversely modify the primary constituent elements. The HCP development process provides an opportunity for more intensive data collection and analysis regarding the use of particular habitat areas by the piping plover. The process also enables us to conduct detailed evaluations of the importance of such lands to the long-term survival of the species.

We will provide technical assistance and work closely with applicants throughout the development of future HCPs to identify lands essential for the long-term conservation of the piping plover and appropriate management for those lands. The take minimization and mitigation measures provided under these HCPs are expected to protect the essential habitat lands designated as critical habitat in this rule. If an HCP that addresses the piping plover as a covered species is ultimately approved, we will reassess the critical habitat boundaries in light of the HCP. We will seek to undertake this review when the

HCP is approved, but funding constraints may influence the timing of such a review.

During the comment period for the proposed designation of critical habitat for the piping plover, BNP Petroleum Corporation submitted a detailed economic analysis, prepared by Milton L. Holloway, Ph.D., Resource Economics, Inc., Austin, Texas. Their analysis concluded that the designation will cause significant economic impacts because of large unoccupied areas being included in the designation, resulting in additional consultations with the Service and delays in proposed projects causing economic effects. They note as an example of such delays, oil and gas operators within critical habitat and the Plan of Operations permit process coordinated by the National Park Service, Padre Island National Seashore. The activities identified as being affected include (1) the exploration, development and production of oil and gas reserves, (2) recreational use of coastal areas, (3) real-estate development projects for residential and commercial use, and (4) transportation of commodities on the Gulf Intracoastal Waterway. They conclude that all landowners having potential habitat (upon initiation of a project) will need to go through the section 7 consultation process with the Service, thus, incurring additional costs to determine if plover habitat is present. Due to the uncertainty of the outcome of such consultations, they conclude that all property will be devalued as a result of the designation. They cite the citizen suit provisions of section 11 of the Act as a means by which property owners may be the target of potential violations of the Act, by opponents asserting that any activity in the area will lead to "take" of the species. They state that this potential for litigation will also result in the devaluation of property.

In the final Economic Analysis prepared for the Service by Industrial Economics, Inc., Cambridge, Massachusetts, there is recognition that the designation of critical habitat for the piping plover may result in additional section 7 consultation costs because future consultations would need to address critical habitat issues, in addition to the effects on the species, and would therefore require more time. Additionally, in the analysis and noted in this rule, we acknowledge that some Federal agencies may initiate consultation more often than before, because critical habitat has increased their awareness of the species. Even though consideration of critical habitat is not likely to impose further project modifications beyond those required by

the listing of the plover, project proponents may nonetheless incur costs above and beyond those attributable to the listing of the plover as a threatened species. These costs might include the value of time spent in conducting section 7 consultations beyond those associated with the listing, and/or delays in implementing oil and gas activities.

The Padre Island National Seashore (Seashore) has in place a General Management Plan/Development Concept Plan (USDI 1983) and a Final Oil and Gas Management Plan/Environmental Impact Statement (USDI 2000), collectively referred to as the Plans. These Plans provide as general management direction that "[n]atural process will be allowed to shape the barrier island with as little interference as possible." We feel that achieving these results will provide for the perpetuation of the primary constituent elements of the plover, since the piping plovers habitat is dependent upon natural processes that shape the coastal environment. Thus, we feel that the National Park Service has in place Plans that provide for adequate management and conservation of the piping plover on lands within the Seashore.

The operating standards in the Oil and Gas Management Plan/Environmental Impact Statement for the Seashore include:

All proposed Plans of Operation will be evaluated for potential impacts to special-status species. If the evaluation indicates a "may affect" situation (includes both beneficial and adverse impacts) on a federally-listed or proposed species, and the adverse impacts cannot be eliminated, consultation or conference with the U.S. Fish and Wildlife Service (FWS) and/or National Marine Fisheries Service must be conducted.

Because Plans of Operation will be evaluated whether or not the activities occur within critical habitat, and piping plovers are present on the Seashore, we find that including the Seashore in critical habitat would provide no additional benefit to the species. In addition, we do not feel that a designation of critical habitat would result in any benefits from an increased awareness of the species presence on the part of Federal agencies and possibly an increased number of consultations. This is due to the fact that the Seashore has Plans in place requiring consultation with the Service when any activities that may affect a federally listed species are proposed within the boundaries of the Seashore.

We also find that exclusion of the Seashore from critical habitat would avoid the additional costs that may result from time delays in addressing

critical habitat issues, in addition to the effects on the species. These costs might include the value of time spent in conducting section 7 consultations beyond those associated with the listing, and/or delays in implementing oil and gas activities.

Thus, based on the BNP Petroleum Economic Analysis and the one prepared for the Service, we find that the benefits of excluding the Padre Island National Seashore outweigh the benefits of its inclusion.

If you have questions regarding whether specific activities will constitute adverse modification of critical habitat, or requests for copies of the regulations on listed wildlife and inquiries about prohibitions and permits, contact the U.S. Fish and Wildlife Service (see contact information under the "Effects of Critical Habitat Designation" section of this final rule).

American Indian Tribal Rights, Federal—Tribal Trust Responsibilities, and the Endangered Species Act

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Government" (59 FR 22951), Executive Order 13175, and the Department of the Interior's requirement at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a Government-to-Government basis. No tribal lands were proposed for designation as critical habitat, and no effects on tribal trust resources are anticipated from this designation.

Required Determinations

Regulatory Planning and Review

Under E.O. 12866 (58 FR 51735, October 4, 1993), we must determine whether this proposed regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the E.O. The E.O. defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees,

or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

(a) While this rule is not expected to have an annual effect on the economy of \$100 million or more, OMB has determined that this final rule is a "significant regulatory action" under E.O. 12866 because it may raise novel legal or policy issues.

Under the Act, critical habitat may not be adversely modified by a Federal agency action; the Act does not impose any restrictions through critical habitat designation on non-Federal persons unless they are conducting activities funded or otherwise sponsored, authorized, or permitted by a Federal agency. Section 7 requires Federal agencies to ensure that they do not jeopardize the continued existence of the species in addition to avoiding adversely modifying critical habitat. In some instances, the designation of critical habitat could result in an increase in section 7 consultations concerning Federal actions that may adversely modify critical habitat, and that may, in some instances, affect third party actions that rely on or are related to the Federal action subject to the consultation (i.e., Federal nexus). However, we do not believe this effect will result from this rulemaking because we are only designating areas that are currently occupied by the wintering population of the piping plover and, based upon our experience with the plover and its needs, we believe that any Federal action or authorized action that could potentially cause adverse modification of designated critical habitat would also be considered as "jeopardy" under the Act, that would result in a section 7 consultation regardless of critical habitat designation.

(b) This rule will not create inconsistencies with other agencies' actions. As discussed above, Federal agencies have been required to ensure that their actions do not jeopardize the continued existence of plover since the listing in 1985. The prohibition against adverse modification of critical habitat is not expected to impose any substantial additional restrictions to those that currently exist. Because of the potential for impacts on other Federal agencies activities, we will continue to review this action for any inconsistencies with other Federal agencies actions.

(c) This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Federal agencies are

currently required to ensure that their activities do not jeopardize the continued existence of the species, and as discussed above, we do not anticipate

that the adverse modification prohibition (resulting from critical habitat designation) will have any significant incremental effects.

(d) OMB has determined that his rule may raise novel legal or policy issues and, as a result, this rule has undergone OMB review.

Categories of activities	Activities potentially affected by species listing only ¹	Additional activities potentially affected by critical habitat designation ²
Federal activities potentially affected ³ .	Activities such as removing or destroying piping plover wintering habitat, whether by mechanical, chemical, or other means (e.g., construction, road building, dredging and other navigation projects, boat launch and marina construction or maintenance, beach nourishment, erosion control); recreational activities that significantly deter the use of suitable habitat areas by piping plovers or alter habitat through associated maintenance activities; sale, exchange, or lease of Federal land that contains suitable habitat that may result in the habitat being destroyed or appreciably degraded.	None.
Private and other non-federal activities potentially affected ⁴ .	Activities such as removing or destroying piping plover habitat, whether by mechanical, chemical, or other means (e.g., construction, road building, dredging and other navigation projects, boat launch and marina construction or maintenance, beach nourishment, erosion control) and appreciably decreasing habitat value or quality (e.g., increased vehicular activity on sensitive habitats, increased predators, reduced water quality, modified hydrology) that require a Federal action (permit, authorization, or funding).	None.

¹ This column represents the activities potentially affected by listing the piping plover as a threatened species (December 11, 1985; 50 FR 50720) under the Endangered Species Act.

² This column represents the effects on activities resulting from critical habitat designation beyond the effects attributable to the listing of the species.

³ Activities initiated by a Federal agency.

⁴ Activities initiated by a private or other non-Federal entity that may need Federal authorization or funding.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) an agency must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions).

However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. In the economic analysis, we determined that designation of critical habitat will not have a significant economic effect on a substantial number of small entities. Although small entities may carry out activities within designated critical habitat, many of these activities lack a Federal nexus and therefore their impacts on critical habitat do not need to be considered. For those actions requiring Federal funding or authority, we believe that the incremental impacts attributable to this rule are not significant for reasons

explained above and in the revised economic analysis. Therefore, we are certifying that the designation of critical habitat for the wintering population of the piping plover will not have a significant economic impact on a substantial number of small entities.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))

Our economic analysis demonstrated that designation of critical habitat will not cause (a) any effect on the economy of \$100 million or more, (b) any increases in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions, or (c) any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.):

a. This rule will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required. Small governments will be affected only to the extent that any programs involving Federal funds, permits, or other authorized activities must ensure that their actions will not adversely affect the critical habitat.

b. This rule will not produce a Federal mandate on State, local, or tribal governments or the private sector of \$100 million or greater in any year, i.e., it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments.

Takings

In accordance with Executive Order 12630, this rule does not have significant takings implications, and a takings implication assessment is not required. This final rule will not "take" private property. The designation of critical habitat affects only Federal agency actions. Federal actions on private lands could be affected by critical habitat designation. However, we expect no regulatory effect from this designation since all designated areas are considered occupied by the species and would be reviewed under both the jeopardy and adverse modification standards under section 7 of the Act.

The rule will not increase or decrease the current restrictions on private property concerning taking of the piping plover as defined in section 9 of the Act and its implementing regulations (50 CFR 17.31). Additionally, critical habitat designation does not preclude development of habitat conservation plans and issuance of incidental take permits. Landowners in areas that are

included in the designated critical habitat will continue to have opportunity to utilize their property in ways consistent with the survival of the piping plover.

Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior policy, the Service requested information from and coordinated development of this critical habitat proposal with appropriate State resource agencies in North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas. We will continue to coordinate any future designation of critical habitat for wintering piping plovers with the appropriate State agencies. The designation of critical habitat for the piping plover is not expected to result in any additional restrictions to those currently in place and, therefore, no incremental impact on State and local governments and their activities are expected. The designation may have some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, doing so may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor determined that

this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We made every effort to ensure that this final determination contains no drafting errors, provides clear standards, simplifies procedures, reduces burden, and is clearly written such that litigation risk is minimized.

Energy Supply, Distribution or Use (Executive Order 13211)

In accordance with Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," the Service asserts that this rule is not likely to have a significant adverse effect on the supply, distribution or use of energy. While this rule is not expected to have an annual effect on the economy or \$100 million or more, OMB has determined that this final rule is a "significant regulatory action" under Executive Order 12866 because it may raise novel legal or policy issues. This rulemaking designates critical habitat for the piping plover and such designation does not impact the Nation's energy resources. This rulemaking does not designate any areas that have been identified as having oil or gas reserves, whether in production or otherwise identified for future use.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any information collection requirements for which Office of Management and Budget approval under the Paperwork Reduction Act is required.

National Environmental Policy Act

We have determined that we do not need to prepare an Environmental Assessment or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969 in

connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited in this final rule are available upon request from the Corpus Christi Ecological Services Field Office (see **ADDRESSES** section).

Author

The primary authors of this final rule include Ecological Services staff from both the Service's Southwestern and Southeastern Regional and Field Offices.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.11(h) revise the entry for "Plover, piping" under "BIRDS" to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
BIRDS							
*	*	*	*	*	*		*
Plover, piping	<i>Charadrius melodus</i>	U.S.A. (Great Lakes, northern Great Plains, Atlantic and Gulf coasts, PR, VI), Canada, Mexico, Bahamas, West Indies.	Great Lakes, watershed in States of IL, IN, MI, NM, NY, OH, PA, and WI and Canada (Ont.).	E	211	17.95(b)	NA.
Do.....	do.....	do	Entire, except those areas where listed as endangered above.	T	211	17.95(b)	NA.

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*

3. Amend § 17.95(b) by adding critical habitat for the piping plover (*Charadrius melodus*) in the same alphabetical order as this species occurs in § 17.11(h), to read as follows:

§ 17.95 Critical habitat-fish and wildlife.

* * * * *

(b) *Birds.*

* * * * *

**Piping Plover (*Charadrius melodus*)
Wintering Habitat**

1. The primary constituent elements essential for the conservation of wintering piping plovers are those habitat components that support foraging, roosting, and sheltering and the physical features necessary for maintaining the natural processes that support these habitat components. The primary constituent elements include intertidal beaches and flats (between annual low tide and annual high tide) and associated dune systems and flats above annual high tide. Important components of intertidal flats include sand and/or mud flats with no or very sparse emergent vegetation. In some cases, these flats may be covered or partially covered by a mat of blue-green algae. Adjacent non-or sparsely vegetated sand, mud, or algal flats above high tide are also important, especially for roosting piping plovers, and are primary constituent elements of piping plover wintering habitat. Such sites may have debris, detritus (decaying organic matter), or micro-topographic relief (less than 50 cm above substrate surface) offering refuge from high winds and cold weather. Important components of the beach/dune ecosystem include surf-cast algae, sparsely vegetated backbeach and salterns (beach area above mean high tide seaward of the permanent dune line, or in cases where no dunes exist, seaward of a delineating feature such as a vegetation line, structure, or road), spits, and washover areas. Washover areas are broad, unvegetated zones, with little or no topographic relief, that are formed and maintained by the action of hurricanes, storm surge, or other extreme wave action.

2. Critical habitat does not include existing developed sites consisting of buildings, marinas, paved areas, boat ramps, exposed oil and gas pipelines and similar structures. Only those areas containing these primary constituent

elements within the designated boundaries are considered critical habitat.

3. Below, we describe each unit in terms of its location, size, and ownership. These textual unit descriptions are the definitive source for determining the critical habitat boundaries. All distances and areas provided here are approximated. General location maps by State are provided at the end of each State's unit descriptions and are provided for general guidance purposes only, and not as a definitive source for determining critical habitat boundaries.

North Carolina (Maps were digitized using 1993 DOQQs, except NC-3 (1993 DRG))

Unit NC-1: Oregon Inlet. 404 ha (997 ac) in Dare County

This unit extends from the southern portion of Bodie Island to the northern portion of Pea Island. It includes all land south of the Oregon Inlet Marina and Fishing Center to 0.50 km (0.31 mile) south of the junction of Highway 12 and SR 1257. This unit includes lands from MLLW on the Pamlico Sound across (and including all land) to MLLW on Atlantic Ocean shoreline. Any emergent sandbars south and west of Oregon Inlet are included.

Unit NC-2: Cape Hatteras Point. 465 ha (1149 ac) in Dare County

The majority of the unit is within Cape Hatteras National Seashore. This unit extends south from the Cape Hatteras Lighthouse to the point of Cape Hatteras and then extends west 6.4 km (4.0 mi) along Hatteras Cove shoreline. The unit includes lands from the MLLW on the Atlantic Ocean and stops landward where densely vegetated habitat, not used by the piping plover, begins and where constituent elements no longer occur.

Unit NC-3: Clam Shoals. 28 ha (70 ac) in Dare County

The entire unit is owned by the State. This unit includes several islands in Pamlico Sound known as Bird Islands. This unit includes lands on all islands to the MLLW.

Unit NC-4: Hatteras Inlet. 516 ha (1273 ac) in Dare and Hyde Counties

The majority of the unit is surrounded by Cape Hatteras National Seashore, but is privately owned. This unit extends west from the end of Highway 12 on the western portion of Hatteras Island to 1.25 km (0.78 mi) southwest of the ferry terminal at the end of Highway 12 on Ocracoke Island. It includes all lands where constituent elements occur from MLLW on the Atlantic Ocean across to MLLW on Pamlico Sound. All emergent sandbars within Hatteras Inlet between Hatteras Island and Ocracoke Island are also included.

Unit NC-5: Ocracoke Island. 80 ha (197 ac) in Hyde County

The majority of this unit is within Cape Hatteras National Seashore. It includes the western portion of Ocracoke Island beginning 3.5 km (2.2 mi) west of the junction of Highway 12 and the local road (no name) extending west to Ocracoke Inlet. It includes all land from MLLW on the Atlantic Ocean across to MLLW on Pamlico Sound. All emergent sandbars within Ocracoke Inlet are also included.

Unit NC-6: Portsmouth Island-Cape Lookout. 3187 ha (7873 ac) in Carteret County

The entire unit is within Cape Lookout National Seashore. This unit includes all land to MLLW on Atlantic Ocean to MLLW on Pamlico Sound, from Ocracoke Inlet extending west to the western end of Piltonty Islands. This unit includes the islands of Casey, Sheep, Evergreen, Portsmouth, Whalebone, Kathryn Jane, and Merkle Hammock. This unit also extends west from the eastern side of Old Drum Inlet to 1.6 km (1.0 mi) west of New Drum Inlet and includes all lands from MLLW on Atlantic Ocean to MLLW on Core Sound.

Unit NC-7: South Core Banks. 552 ha (1364 ac) in Carteret County

The entire unit is within Cape Lookout National Seashore. This unit extends south from Cape Lookout Lighthouse, along Cape Lookout, to Cape Point and northwest to the northwestern peninsula. All lands from MLLW on the Atlantic Ocean, Onslow Bay, and Lookout Bight up to where densely vegetated habitat, not used by